

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit

JAVA COCOANUT OIL COMPANY, LTD. (a corporation),

Plaintiff in Error,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND
(a corporation),

Defendant in Error.

No. 4125

JAVA COCOANUT OIL COMPANY, LTD. (a corporation),

Plaintiff in Error,

vs.

GLOBE INDEMNITY COMPANY (a corporation),

Defendant in Error.

No. 4126

REPLY BRIEF FOR PLAINTIFF IN ERROR.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff in Error.

ALFRED SUTRO,
EUGENE M. PRINCE,
Of Counsel.

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PRELIMINARY STATEMENT.

Defendants in their brief make four points: *First*, that Judge Dietrich's ruling on the demurrers does not support the plaintiff's claim for attorneys' fees, despite the fact that he held the amended complaints sufficient, and that the allegations of these complaints were established without dispute; *second*, that any liability which

there may have been was removed by the release bonds which plaintiff posted with the marshal, relying for this contention upon a Missouri case squarely contrary to a decision of this court; *third*, that no part of the fees in question is, in any event, chargeable against the attachment undertakings, although defendants, in effect, admit that this claim is against the great weight of authority. Finally, they contend that the case is not open to review because plaintiff made no motion for judgment in the trial court. A sufficient answer to this contention is, we think, that every point of law argued in this court by plaintiff was raised, as will be shown, by the trial court's rulings on evidence, to which plaintiff reserved proper and timely exceptions.

ARGUMENT.

FIRST: JUDGE DIETRICH HELD THAT THE AMENDED COMPLAINTS STATED SUFFICIENT FACTS TO ENTITLE PLAINTIFF TO RELIEF, AND THE ALLEGATIONS OF THE AMENDED COMPLAINTS WERE EITHER ADMITTED OR ESTABLISHED BY UNCONTRADICTED EVIDENCE.

The amended complaints clearly showed that the amounts which plaintiff sought to recover were fees paid for defending Porter's suits on the merits (Tr. pp. 5-6; 143-144). It was on this very point, indeed, that defendants based their demurrers (Tr. pp. 10, 147).

When, therefore, Judge Dietrich held that "the facts pleaded are sufficient to entitle the plaintiff to relief" (Tr. p. 14), his decision manifestly was a definite ruling that attorneys' fees expended in defeating a

claim on its merits are recoverable damages on an attachment bond, where a defense of the case is necessary to dissolve the attachment. The necessity of such defense in the cases at bar plaintiff proved by showing that each attachment was regular on its face, and that neither could have been dissolved except by defeating Porter on the merits (Tr. pp. 67-69). Defendants stipulated that the amounts prayed were the reasonable value of the services of plaintiff's attorneys *after* the levy of Porter's attachments in *defending* his actions against plaintiff (Tr. pp. 32-35). Every other allegation of the amended complaints was established by undisputed evidence.

It is true, Judge Dietrich said, that the decision on the demurrers was not to foreclose "certain questions discussed by the defendant(s) partly upon the assumption of facts appearing only by remote inference or in the records of the attachment cases" (Defs. Br. p. 7, Tr. p. 14). This reference, we think, was to the release bonds (Tr. pp. 93-95, 96-97). Defendants had argued on the demurrers, as they argue here (Defs. Br. pp. 8-17) that the bonds which plaintiff gave to re-obtain possession of the attached property, destroyed the liability of defendants as sureties. This defense did not appear from the face of the amended complaints, and could not, therefore, have been properly considered on the demurrers. It was this defense, quite obviously we think, which Judge Dietrich did not wish to "foreclose".

The claim that the dissolution of the attachments turned out to be a "mere incident" of the defense of

the actions in which the writs issued (Defs. Br. p. 7) is, we think, beside the point. The entire defense in those actions was to establish that the actions had no just foundation, and that the attachments, despite their apparent regularity, should never have been issued.

So far as Judge Dietrich's ruling is concerned, the situation, we submit, is this—that every fact alleged in the amended complaints was established at the trial. The further circumstance, also developed at the trial, that redelivery bonds were given, we submit, did not affect the liability of defendants in the slightest (See Pl. Br. pp. 39-43). Manifestly, under the law as stated in Judge Dietrich's decision on the demurrers, plaintiff was entitled to judgment.

SECOND: THE FORTHCOMING OR REDELIVERY BONDS WHICH PLAINTIFF POSTED WITH THE MARSHAL TO OBTAIN POSSESSION OF THE ATTACHED PROPERTY DID NOT DESTROY OR IMPAIR THE LIABILITY OF DEFENDANTS FOR ATTORNEYS' FEES.

Defendants argue that the attachments were released by the release of attachment undertakings (Tr. pp. 93, 95, 96, 97), and that plaintiff, therefore, sustained no damage by reason of the attachments, except the cost of the release bonds. This argument rests upon the assumption either that the release bonds discharged the attachments and vacated the writs, or else upon the theory that, inasmuch as plaintiff reobtained possession of its property, it makes no difference whether the writs were released or not.

In support of their contention defendants rely upon *State v. Fargo*, 151 Mo. 280, 52 S. W. 199. In that case the court pointed out that the effect of the pertinent Missouri statute was “to dissolve the attachment, and to vacate all proceedings touching the property and effects attached and the garnishees summoned” (52 S. W. 201). The court distinguished prior Missouri decisions, which had held that attorneys’ fees were recoverable damages, on the ground that (52 S. W. 202):

“The effect of the execution of the bond to dissolve the attachment was, as we have said, to at once vacate the attachment and all proceedings thereunder.”

In other words, the express point of the *Fargo* case was that, where an undertaking has been given “to dissolve the attachment, and to vacate all proceedings touching the property and effects attached”, attorneys’ fees for services on the merits cannot be recovered as damages on the attachment bond.

Passing for the moment the point that the bonds in the cases at bar did not “dissolve the attachment” or “vacate all proceedings touching the property and effects attached”, we submit that the *Fargo* case is directly contrary to the decision of this court in *Anvil Gold Mining Co. v. Hoxsie*, 125 Fed. 724 (Pl. Br. pp. 39-41), and is not law in this circuit. The *Hoxsie* case specifically held that, despite the giving of a *discharge* bond, a bond like that given in the *Fargo* case, the attachment defendant, if he prevails on the merits, can maintain an action on the attachment bond to recover his costs and damages.

Defendants contend that the *Horsie* case is not in point, because, they say, "No question of attorneys' fees was involved in that case" (Defs. Br. p. 8). This contention, we submit, merely begs the question. The *Horsie* case holds that the attachment defendant, despite the discharge bond, can recover his costs and damages from the attachment surety. Clearly, therefore, if attorneys' fees for services touching the merits are, as we contend, damages by reason of the attachment, they can be recovered.

We pointed out in our opening brief (pp. 41-43), however, that the release bonds in the cases at bar did not discharge the attachments, and that plaintiff here, is in a much better position even than the successful plaintiff in the *Horsie* case.

In our opening brief (p. 41) we inadvertently referred to Section 540 of the Code of Civil Procedure as the section under which the forthcoming bonds were given. As a matter of fact, however, these bonds were given under Section 555 of the Code of Civil Procedure. The bonds comply with the requirements of that section and are not conditioned, as provided in Section 540. It is true that no order for the release of the attachments was made, as provided in Section 554 of the Code of Civil Procedure, but this omission, we submit, clearly in no way affects the questions involved in this case. The fact is that the bonds were forthcoming bonds (Tr. pp. 93-97), given after the attachments were levied and were not preventative bonds to stop the levying of the attachments, as contemplated by Section 540. That the giving of a forthcoming bond *to release*

attached property does not *dissolve* the attachment, as defendants would have it appear, is manifest from a consideration of the provisions of Section 556 of the Code of Civil Procedure. It is there provided that a defendant may, *after the release of the attached property*, on motion, apply to have the writ of attachment discharged. We quote the section in full:

“The defendant may also at any time, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply, on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to a judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued.”

It is obvious, we submit, that if the contention of defendants, that the release of the attachment is the equivalent of its discharge or dissolution, were sound, then the provisions of Section 556 would be meaningless. On the other hand, we contend that Section 556, by providing that an attachment may be discharged after it has been released, clearly points the distinction between the mere release of an attachment and its entire discharge. With the discharge of an attachment the whole proceeding falls, while with its mere release, although the lien of the attachment ceases as to any specific property attached, the writ of attachment remains in full force and effect and operates to hold the sureties on the release bond to the liability assumed in lieu of the property attached. In these cases there was at no time any order discharging the attachments,

and the same, and the liability of the sureties on the forthcoming or redelivery or release of attachment bonds, whatever they may be called, continued until judgment on the merits was entered in favor of plaintiff.

THIRD: THE ATTORNEYS' FEES PAID BY PLAINTIFF IN DEFENDING PORTER'S ACTIONS ON THE MERITS ARE DAMAGES, FOR WHICH DEFENDANTS ARE LIABLE.

Defendants make no effort whatever to distinguish or impeach the cases cited in our opening brief that attorneys' fees expended by a defendant in defeating an action can be recovered as damages from the surety on the attachment bond of the attachment plaintiff, if the attachment was regular on its face and could not have been dissolved except by successfully defending the case on its merits (Pl. Br. pp. 20-29). The only case which defendants cite is *St. Joseph Stock Yards Co. v. Love*, 57 Utah 450, 195 Pac. 305 (Defs'. Br. p. 22). That case, for the reasons given in our opening brief (pp. 29-32), we submit, is not a sound precedent.

Defendants claim that plaintiff's attorneys appeared in the Porter cases and prepared answers and cross-complaints before Porter's attachments were levied (Defs. Br. p. 19). This statement is, we think, answered by the stipulation of defendants that the amounts prayed were the reasonable value of the services of plaintiff's attorneys in defending the Porter cases, after Porter's attachments were levied (Tr. pp. 32-34; Pl. Br. pp. 16-17). Any services before the attachments are clearly not material.

The argument (Defs. Br. p. 19) that plaintiff's attorneys would probably have rendered the same services had there been no attachments, is similar to the argument made by the defendants in practically all of the cases cited in our opening brief (pp. 25-29). In each of those cases such argument was held untenable. The cases hold that where the action has been defeated, there was no right to sue out the attachment, and that the services attributable to the defense of the suit on its merits cannot, in the very nature of things, be segregated from those necessary to discharge the attachment. The same services operate to defeat the suit and to discharge the attachment, and for that reason it is held the attorneys' fees are recoverable under the attachment bond.

The principle of the cases cited is particularly applicable under the California statute. Section 539 of the Code of Civil Procedure, under which the attachment bonds in the cases at bar were posted, fixes two liabilities upon the surety. The conditions of the bonds were in accordance with that section (Tr. pp. 8-9, 145-146):

1. "if the said Defendants or either of them recover judgment in said action, said Plaintiff will pay all costs that may be awarded to the said Defendants or either of them and all damages which they or either of them may sustain by reason of the said attachment".

2. "if the said attachment is discharged on the ground that Plaintiff was not entitled thereto under section five hundred and thirty-seven, Code of Civil Procedure, the Plaintiff will pay all damages

which the defendant may have sustained by reason of the attachment”.

In both contingencies the liability of the surety for damages is the same and is expressed in identical language. If, therefore, damages by reason of the attachment include attorneys’ fees in the one case, they necessarily include them in the other, under the well settled rule that the same word used in different parts of the same statute will be given the same meaning in each instance (*Babbitts’ Case*, 16 Ct. Cl. 212; *United States v. Hill*, 123 U. S. 681, 686). In the cases at bar defendants specifically admit that if the attachments had been dissolved by motions, or other direct proceedings to that end, then plaintiff could have recovered the fees of its attorneys for services in the dissolution proceedings. Defendants say (Defs. Br. pp. 14-15):

“Of course if after the execution of the release of an attachment undertaking *a motion is made to vacate the writ* upon the ground that it was ‘improperly or irregularly issued’ and the motion should be granted, the surety would be liable for attorney’s fees *incurred on such motion*, as was pointed out in the *Federal Biscuit Co. case supra*, cited by plaintiff in error.”

In other words, by defendants’ own admission, the words in the bonds “damages * * * by reason of the attachment” include attorneys’ fees, if the attachment is discharged on motion. Manifestly, therefore, we submit, the provision that “if the defendant recovers judgment”, then the surety is liable for “damages * * * by reason of the attachment,” likewise includes attor-

neys' fees. Since a defendant obviously cannot "recover judgment" without the services of an attorney, such fees must be for the services rendered in defending the suit on its merits.

FOURTH: THE POINTS OF LAW ARGUED BY THE PLAINTIFF ON THESE WRITS OF ERROR WERE RESERVED BY PROPER EXCEPTIONS IN THE TRIAL COURT.

Defendants' last point is that the fact that plaintiff made no motions for judgments in the court below prevents this court from reviewing the sufficiency of the evidence, and therefore, that the judgments should be affirmed. This contention, we submit, is without merit. A motion for judgment, so far as the question here under consideration is concerned, is only necessary to obtain a ruling on a question of law, to which an exception can be reserved. Where the court rules on the question of law during the trial and exception is taken to its ruling, then a motion for judgment or exception following such motion is obviously unnecessary.

Plaintiff contends that the trial court erred in two rulings of law, first, in holding that attorneys' fees for services touching the merits of a case cannot be recovered as damages on an attachment bond where the attachment could not have been dissolved except by a successful defense of the merits; second, in ruling that the forthcoming bonds which plaintiff gave the marshal destroyed the liability of defendants. On both these questions the trial court ruled adversely to plaintiff in passing upon the evidence, and plaintiff reserved timely and proper exceptions.

The question as to the liability of defendants for attorneys' fees touching the merits of Porter's suits arose during the trial, when defendants offered in evidence the record in the Porter suits. To this offer plaintiff objected (Tr. p. 106). The trial court admitted the evidence (see Tr. p. 106), and plaintiff reserved an exception (Tr. p. 107). In amplification of the objection and exception plaintiff's counsel said (Tr. pp. 107-108):

"Mr. SUTRO. Might I say to your Honor at this point, which your Honor stated, about the allocation of the fees, just to call your Honor's attention, in connection with our objection, to the stipulation that they have made, that \$15,000 in one case and \$10,000 in another case were reasonable charges.

The COURT. For the whole case?

Mr. SUTRO. No, that is just the point that I want to bring to your Honor's mind. 'It is stipulated that the sum of \$10,000 is the reasonable value of the services rendered subsequent to the 27th day of December, 1920, by Messrs Pillsbury, Madison & Sutro, as attorneys for plaintiff in defending the original action No. 16,452,' and the stipulation is the same in the other case. In other words, that that is the reasonable charge after attachment was levied in each case. *Now, it narrows itself down to the one point, are we entitled to that fee paid for these services for defending this suit and ridding the plaintiff of the attachment in each case?*

* * * * *

The COURT. I understand."

The point, in other words, was that plaintiff was entitled to recover the fees it had paid its attorneys for services touching the merits; that the amount and reasonable character of these fees was not in dispute, and therefore, that the proffered evidence was incompetent

and immaterial. The court's adverse ruling on these points is fully covered by plaintiff's exception (Tr. pp. 106-107).

The question whether or not defendants are liable for attorneys' fees touching the merits of the Porter suits is also preserved by plaintiff's exceptions to the court's ruling admitting the release bonds in evidence (Tr. pp. 92-95). For reasons given in this brief and in our opening brief, we submit that the bonds were immaterial and should not have been admitted. The manifest error in this regard, we submit, in and of itself, requires a reversal of the judgments, unless this court should hold that the fees sued for were not recoverable in any event. The rulings on the bonds, consequently, again raise the question of defendants' liability for the attorneys' fees, with which these writs of error are primarily concerned.

The error, as such, in admitting the release bonds is, of course, directly presented by plaintiff's exceptions (Tr. pp. 92-95).

It is a statutory rule that erroneous rulings on evidence, to which proper exceptions have been reserved, can be reviewed regardless of whether the record contains special findings of fact or whether the record contains special findings of fact or whether the unsuccessful party made a motion for judgment (Rev. Stats., Sec. 700, 6 Fed. Stats. Ann. 205, Comp. Stats., Sec. 1668; *Tyng v. Grinnell*, 92 U. S. 467, 469; *Grayson v. Lynch*, 163 U. S. 468, 473; *Oakland Water Front Co. v. Leroy*, 282 Fed. 385 (C. C. A., 9th Circuit)).

Even independently of the foregoing considerations, we submit, this court's right to review the cases is not precluded by the absence of motions for judgment. Under the decision of the Supreme Court in *Coler v. Cleburne*, 131 U. S. 162, a bill of exceptions in the form of the bill of exceptions in the cases at bar is sufficient as a special finding of facts. In the case cited the Supreme Court said (p. 163):

“There is no special finding of facts, but there is a bill of exceptions, which, after setting forth what was proved, states, that the court, on the pleadings and proof, found the law for the defendant, and rendered final judgment for it and against the plaintiff, for costs of suit. This is a sufficient special finding of facts to authorize us, under Section 700 of the Revised Statutes, to determine whether the facts found are sufficient to support the judgment.”

In the cases at bar the bill of exceptions is cast in almost the exact form of the bill in the *Coler* case.

It is, we think, unnecessary to discuss the cases cited by defendants (Defs. Br. p. 26). All these cases recognize the rule that the contentions of a plaintiff in error may be preserved by proper exceptions to the trial court's rulings on evidence. In no one of them, moreover, did the facts bring the case within the decision of the Supreme Court in *Coler v. Cleburne*.

It clearly appears from the foregoing, we submit, that even from the most technical standpoint, the questions urged by plaintiff are properly raised by the record. It seems hardly necessary to consider, therefore, whether defendants' contention could, in any

event, be sustained in view of the 1919 amendment to Section 269 of the Judicial Code (40 Stats. 1181; Fed. Stats. Ann. 1919, Supp. p. 231; Comp. Stats., Sec. 1246. See *Liberty Oil Co. v. Condon National Bank*, 260 U. S. 235, 244-245). That amendment is as follows:

“Sec. 269. * * * On the hearing of any appeal, certiorari, writ or error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.”

We respectfully submit that, as to the attorneys' fees, the judgments below should be reversed.

Dated, San Francisco,

June 11, 1924.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff in Error.

ALFRED SUTRO,

EUGENE M. PRINCE,

Of Counsel.

